opinion the remedy laid down in those sections is not an exclusive but a cumulative remedy; the remedy is alternative to the remedy by way of suit.

For these reasons, the objection of the first defendant is overruled. Costs to be paid by the first defendant.

Order accordingly.

R. v. CHIN AH CHONG.

[A. Cr. J. (Spenser Wilkinson, J.) November 13, 1952]

[Penang — Criminal Appeal No. 33 of 1952]

Criminal Procedure Code (Cap. 21) — Whether s. 252 gives power to the Court to award costs — If so whether the section binds the Crown — Circumstances under which costs should be awarded.

This is an appeal against the order of the President of the Sessions Court awarding costs against the Crown as a term of an adjournment. The prosecuting officer became sick on the day of the trial and later in the morning a Police Officer applied for an adjournment on the ground of the prosecuting officer's illness. The learned President considered the circumstances sufficiently exceptional to award costs against the Crown. The appeal raises three important questions: (1) Whether the words "on such terms as it thinks fit" in section 252 of the Criminal Procedure Code give power to the Court to award costs as part of those terms; (2) if so, whether this section binds the Crown; (3) if the section covers costs and binds the Crown, whether the learned President was correct in the circumstances to award costs?

Held: (1) on the 3rd question, before costs are awarded against the Crown under section 252 the circumstances must be exceptional. There should be some element of frivolity, vexation or unreasonableness. In this case the sudden illness of the prosecuting officer is a reasonable ground for an adjournment; (2) there are various sections in the Code dealing with costs so that if it is intended that section 252 should confer the power to award costs it should have specially said so; (3) section 55 of the Interpretation and General Clauses Ordinance, 1948, clearly lays down that the Crown is not bound unless it is expressly provided or there is a necessary implication that the Crown is bound. The Criminal Procedure Code being an Ordinance the main purpose of which is to regulate proceedings between the Crown and the subject, there is a necessary implication that the Crown is bound.

Cases referred to:—

(1) *In re Abdul Rahiman* 52 Bom. 254.

(2) *S. Ratnam Thangavelu v. Public Prosecutor* (1934) M.L.J. 225; (1933-34) F.M.S.L.R. 283.

(3) *R. v. Mohamed bin Sudin* (1935) M.L.J. 274; (1935) S.S.L.R. 309.

(4) *Thomas v. Pritchard* (1903) 1 K.B. 209.

(5) *Moore v. Smith* 120 E.R. 1034.

CRIMINAL APPEAL.

C. M. Sheridan (D.P.P.) for the Crown.

C. O. Lim for the respondent.

Spenser Wilkinson, J. : — This was an appeal on behalf of the Crown against an order of the President, Sessions Court awarding $30 costs against the Crown as part of the terms of an adjournment in a prosecution in which the accused was charged with certain offences under section 193 of the Penal Code.

The question of costs arose in this way. There had been certain adjournments and the case was fixed to proceed at 10 a.m. on the 13th June, 1952. At 8.30 a.m. the wife of the prosecuting officer informed the President by telephone that the prosecuting officer was sick and would be unable to appear in Court that day. No one appeared to represent the prosecution until 10.45 a.m. when a Police officer appeared to ask for an adjournment on the ground of the prosecuting officer's sickness. The learned President considered that the circumstances of the case were sufficiently exceptional to allow costs against the prosecution, because the prosecution had not done all that might reasonably be done to ensure that the case should go on that day, in that the prosecution had not taken steps to call the investigating officer to assist a substitute prosecuting officer.

Three questions arose on the argument of the appeal:—

(1) Does the expression in section 252 of the Criminal Procedure Code "on such terms as it thinks fit" give power to the Court to award costs as part of those terms?

(2) If so, does this section bind the Crown?

(3) If the section covers costs and binds the Crown, was the learned President correct in the circumstances of this case in making the order as to costs?

I will deal with the third point first. I think there is no doubt that before costs are awarded against the Crown under section 252 the circumstances must be exceptional. In the Indian case of *In re Abdul Rahiman*[1] the following passage appears in the judgment of Heaton, J.: —

"It will be seen from the case of **Mathura Prasad v. Basant Lal** that the Allahabad High Court has come to the conclusion that such an order is permitted by the terms of section 344 of the Code of the Criminal Procedure. The same conclusion, we gather, has been reached by the High Courts of Calcutta and Madras. But the Criminal Procedure Code does not make special provision for costs in the course of a criminal trial and one thing seems to me to be perfectly clear and it is this: That if section 344 is to be regarded as justifying an order as to costs it can only be where the circumstances are exceptional and where for some reason or another the ordinary everyday method of conducting criminal cases must be departed from."

The local cases of *S. Ratnam Thangavelu v. Public Prosecutor*[2] and *Rex v. Mohamed bin Sudin*[3], both of which were decisions on what is now section 316 of the Straits Settlements Criminal Procedure Code, decided that before a respondent can be awarded costs in a criminal appeal he must show that the

prosecution was vexatious or continued without reasonable and probable cause or frivolous. Section 316 gives the High Court full power to award such costs as the Court thinks fit, and I think, therefore, that the same principles must be applied to section 252. In my opinion the sudden illness of a prosecuting officer is a reasonable ground for an adjournment and I think it is asking too much to expect the prosecution to be able to produce another prosecuting officer sufficiently *au fait* with the facts to continue the prosecution by 10 a.m. if the illness is only known about that morning. It might be thought at first sight that there was, perhaps, some lack of courtesy to the Court in failing to have someone there to ask for an adjournment at 10 a.m. but allowance must be made for the heavy duties laid upon the Police during the Emergency and there was certainly in this case no element of frivolity, vexation or unreasonableness in the conduct of the prosecution. For this reason I do not think the learned President was right in awarding to the accused costs of the adjournment.

This being so it is, strictly speaking, unnecessary for me to decide the other two questions, but in view of the arguments put before me I think I ought, briefly, to express my views thereon.

It appears to me from the quotation set out above from the judgment of Heaton, J. in *Abdul Rahiman's case*[1] that that learned Judge notwithstanding the decided cases had some doubts as to whether section 344 of the Indian Code (which is the same as our section 252) was apt to justify an order as to costs. In the absence of authority I, too, would have considerable doubts as to whether in a Criminal Procedure Code the words "such terms as it thinks fit" include terms as to costs, particularly in our Code which, unlike the Indian Code, has various sections specifically dealing with costs in criminal proceedings. Section 306(6), section 316, section 452 and section 456 of our Code all deal expressly with the matter of costs. I attach considerable importance to the provisions of sub-section (6) of section 306, which uses the expression "such terms as to the costs of the appeal or otherwise as it thinks fit". From this it appears to me that where the Code intends to give power to award costs it says so. It would have been so easy to insert a reference to costs in the section, that its absence suggests to me that costs were not intended to be included. By reason of the considerable differences on the subject between our Code and the Indian Code, the Indian decisions do not really assist me on this point.

A comparison between our section 252 and section 5(5) of the English Indictments Act, 1915 is of interest. Sub-section (5) of section 5 says :—

> "The Court may make such order as to costs and as to admitting the accused person to bail and as to the enlargement of recognizances and otherwise as the Court thinks fit."

Here where costs are intended to be dealt with in criminal proceedings, they are expressly mentioned. I an inclined to think, therefore, that our section 252 in using the word "terms" means terms as to bail or custody of the accused and is not intended to include terms as to costs.

As to the question as to whether section 252 binds the Crown the Deputy Public Prosecutor argued that the payment of costs in criminal proceedings depends entirely on statute law; that there is a general rule which has been laid down by the Privy Council and the House of Lords that the Crown neither pays nor receives costs, except where the situation is covered by a Statute or there are exceptional circumstances; and that section 55 of the Interpretation and General Clauses Ordinance, 1948 clearly lays down that the Crown is not bound unless it is expressly provided or there is a necessary implication that the Crown is bound; and he referred to the decision in *Thomas v. Pritchard*[4]. The argument is an attractive one but I have come to the conclusion that the point is really covered by the decision in *Moore v. Smith*[5]. In that case Lord Campbell said :—

> "It is a maxim that the Crown is not bound by an Act of Parliament without express words. But I think there is express language in this Statute to show that it includes all cases of appeal, and therefore those in which the Crown is interested."

Paraphrasing this it can be said that section 252 includes all cases of prosecutions and therefore those in which the Crown is interested. The Criminal Procedure Code being an Ordinance the main purpose of which is to regulate proceedings between the Crown and the subject I think there is a necessary implication that the Crown is bound, except by those parts of it which from the context are clearly not applicable to the Crown.

Neither of these last two points is very clear and I respectfully endorse in regard to our law the comments made by Alverstone, C.J., in *Thomas v. Pritchard*[4] regarding the English law, to the effect that legislation was highly desirable in this matter "which is one that ought to be made perfectly clear".

Mr. C. O. Lim for the accused did not seek to uphold the order as to costs and, for the reason given in the first part of this judgment, I allowed the appeal and reversed the order of the learned President awarding $30 costs to be paid by the Crown.

Appeal allowed.

TEH AH KUAY v. PUBLIC PROSECUTOR.

[A. Cr. J. (Wilson, J.) December 5, 1952]

[K.L. — Selangor Criminal Appeal No. 55 of 1952 and 511]

Penal Code, ss. 420 and 511 Charge of cheating — Evidence of attempting to cheat.

The appellant was charged with and convicted of an offence of cheating contrary to section 420 of the Penal Code. The facts were as follows: On January 28th about 10 persons were playing a game of cards in the back portion of a coffee-shop. A police Lieutenant in the Criminal Intelligence Representative at Klang came and raided the shop. Some days later a Chinese, who stated he was a police Inspector, went to the shop and questioned one Lim Thong Chong, the coffee-shop keeper, about the gambling. Thong Chong was very worried and someone suggested to him he should see the appellant, which he did. He told the appellant his worries and 3 or 4 days later the appellant, according to the evidence, said he wanted $400 to settle the person who raided the shop. Thong Chong then reported the matter to an A.S.P. in the anti-corruption branch. As a result, $400 in ten-dollar notes were marked and, according to Thong Chong, they were handed to the appellant. This evidence was corroborated by one Leow Her Hia. Subsequently, the appellant was arrested and searched and two marked ten-dollar notes were found in his possession.

Held: the evidence did not support the conviction but the appellant could and should have been convicted of the offence of attempting to cheat.

Case referred to:—

(1) *Light* 11 Cr. App. R. 111.

CRIMINAL APPEAL.

K. K. Benjamin for the appellant.

P. G. Clough (D.P.P.) for the Public Prosecutor.

Cur. Adv. Vult.

Wilson, J.: — Lim Thong Chong is a coffee-shop keeper in partnership with five others. On the 28th January about ten persons were playing a game of cards in the back portion of the coffee-shop. A Police Lieutenant in the Criminal Intelligence Representative at Klang came and raided the shop. Some days later a Chinese, who stated he was a police inspector, went to the shop and questioned Thong Chong about the gambling. Thong Chong was very worried and someone suggested to him he should see the appellant, which he did. He told the appellant his worries and three or four days later the appellant, according to the evidence, said he wanted $400 to settle the person who raided the shop. Lim Thong Chong then reported the matter to an Assistant Superintendent of Poilce in the anti-corruption branch. As a result, $400 in ten-dollar notes were marked and, according to Lim Thong Chong, they were handed to the appellant. This evidence was corroborated by Leow Her Hia. Subsequently, the appellant was arrested and searched and two of the marked ten-dollars notes were found in his possession.

The Deputy Public Prosecutor admitted that on that evidence the accused should not have been convicted of cheating under section 420 of the Penal Code but maintained that he could and should have been convicted of attempting to cheat.

Mr. Benjamin for the appellant stated that the case upon which the Deputy Public Prosecutor relied was an English case, that the Penal Code in this country was based on the Indian Penal Code and that the English case had no application here. However, I find in the Law of Crimes, *Ratanlal and Dhirajlal Thakore*, 17th edition at page 1045 the following sentence:—

"Where a person knows that the statements made by another are false, but still acts upon them with a view to entrap that person, it will not amount to cheating but will amount to attempt to cheat."

One of the authorities quoted to support this statement is the case of *Light*[1], upon which Mr. Clough relied. In my opinion there was ample evidence in this case to support the charge of attempting to cheat and whilst the conviction under section 420 of the Penal Code must be quashed, there will be substituted for it a conviction under section 511 of the Penal Code of attempting to commit an offence contrary to section 420 of the Penal Code. I see no reason to reduce the sentence imposed of six months' rigorous imprisonment and the same will stand.

Conviction substituted.
Sentence confirmed.

NAWAB DIN v. MOHAMED SHARIFF & ORS.
and
MOHAMED SHARIFF & ORS. v. NAWAB DIN.

[O. C. J. (Thomson, J.) November 4, 1952]

[Ipoh — Civil Suit Nos. 106 & 138 of 1951]

Agreement for sale with option to re-purchase at same price — Purchaser to have profits of land — Whether agreement was agreement for sale or a mortgage.

These two suits were heard together and the claim of the plaintiff in the second suit was treated as a counterclaim to the first suit. The defendants in the first suit had obtained judgment against another party from the Japanese Court for possession of a piece of land with 3 houses subject to payment of $6,250 and interest. The plaintiff agreed to lend a sum of $7,000 to the defendants to enable the latter to satisfy the judgment debt. On December 13th, 1944 they executed an agreement and the defendants executed a Power of Attorney in favour of the plaintiff. By the agreement the defendants agreed to sell to the plaintiff one of the 3 houses and the land on which it stands in consideration of the sum of $7,000, the former remaining the registered proprietors of the land. The important terms of the agreement were that the plaintiff was to remain in possession of the house free from interference for 3 years during which period the defendants were prohibited from selling, or creating any charge on it. After the 3 years, and within 2 months after that, the defendants were to have the right to repurchase for the same price of $7,000. If the